

Date Issued: JUNE 18, 1996

Case No.: 95-JTP-14

In the Matter of:

TENNESSEE OPPORTUNITY PROGRAM, INC.
Complainant

v.

U.S. DEPARTMENT OF LABOR,
Respondent

Appearances:

Rebecca Wells Demaree, Esq.
Nashville, Tennessee
For the Complainant

Frank P. Buckley, Esq.
Washington, D.C.
For the Respondent

Before: JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises under the Job Training Partnership Act, 29 U.S.C. § 1501 *et seq.* (hereinafter “JTPA”) and the regulations contained at 20 C.F.R. § 626 *et seq.* Complainant Tennessee Opportunity Program, Inc. (TOPS) requested administrative review under 20 C.F.R. § 636.10 of the decision of the grant officer to disapprove their application for a grant to provide services to the migrant and seasonal farmworkers in the state of Alabama under Title IV, Section 402 of the JTPA, 29, U.S.C. § 1672 *et seq.* and award the grant to another applicant, the Alabama Department of Economic and Community Affairs. A formal hearing was held in Nashville, Tennessee on April 30, 1996. The parties filed pre-hearing briefs and declined to submit post-hearing briefs.

Findings of Fact and Conclusions of Law¹

A. Background

Section 402(a) of the JTPA states

The Congress finds and declares that --

- (1) chronic seasonal unemployment and underemployment in the agricultural industry, aggravated by continual advancements in technology and mechanization resulting in displacement, constitute a substantial portion of the Nation's rural employment problem and substantially affect the entire national economy; and
- (2) because of the special nature of farmworker employment and training problems, such programs shall be centrally administered at the national level.

29 U.S.C.A. § 1672. As stated above, Congress determined that this program should be administered by the Federal government versus administration by the individual states. Section 402 requires that the Secretary of Labor

. . . provide services to meet the employment and training needs of migrant and seasonal farmworkers through such public agencies and private nonprofit organizations as the Secretary determines to have an understanding of the problems of migrant and seasonal farmworkers, a familiarity with the area to be served, and a previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers.

29 U.S.C.A. § 1672(c)(1). Competition for grants is conducted every two years and the Secretary is required to use procedures that are "consistent with standard competitive Government procurement policies." 29 U.S.C.A. § 1672(c).

To implement this program, the Secretary of Labor promulgated the regulations located at 20 C.F.R. Part 633. The procedures for awarding funding grants under Section 402 of the JTPA are found at 20 C.F.R. §§ 633.201 through 205. Under these regulations, the Department of Labor is required to publish a notice and solicitation for grant application (SGA) in the *Federal Register*. 20 C.F.R. § 633.202(a). Eligible applicants who intend to apply for the grant must file a Preapplication for Federal Assistance with the Department of Labor by a date specified in the SGA. 20 C.F.R. § 633.202(b). Under section 633.202(d), which implements Executive Order 12372 with regard to this program, applicants are required to provide copies of the applications to the State for which they are applying for comment if that state has established a consultation

¹ Citations to the record will be abbreviated as follows: CX - - Complainants Exhibit; RX - - Respondent's Exhibit; TR - - Hearing Transcript.

process expressly covering this program. The application is to be submitted to the State by the deadline for submission to the Department of Labor. 20 C.F.R. § 633.202(d).

Once the Department of Labor receives the applications, they are reviewed to make sure that they comply technically with all of the requirements (TR 55). The applications are then forwarded to a panel for review and a list of the names of the applicants is forwarded to the office that performs the responsibility reviews (id.). The responsibility review is independent of the competitive process and consists of a review of all available records to determine whether the applicant has established overall responsibility to administer Federal funds. 20 C.F.R. § 633.204

The panel reviews the applications under the review standards established at 20 C.F.R. § 633.203 and noted in the SGA. These include

- (a) An understanding of the problems of migrant and seasonal farmworkers;
- (b) A familiarity with the area to be served;
- (c) A previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers;
- (d) General administrative and financial management capability;
- (e) Prior performance with respect to financial management, audit and program outcomes.

20 C.F.R. § 633.203. The panel then makes recommendations to the Grant Officer as to which applicant should be awarded the grant (TR 59-60). Once the Grant Officer reviews the recommendations of the panel and makes his own independent determination that the recommendations are correct (id.), the selected applicant is notified and invited to negotiate the final terms and conditions of the grant. 20 C. F.R. § 633.205(a). Applicants who are not selected are also notified in writing at this time. 20 C.F.R. § 633.205(c). Applicants whose applications are denied are given the opportunity to request an administrative review as provided for in 20 C.F.R. Part 636. 20 C.F.R. § 633.205(e).

In accordance with the procedures described above, the U.S. Department of Labor issued a notice of invitation to submit applications for funding for migrant and seasonal farmworker training and employment programs for program years 1995 and 1996 on December 27, 1994. 59 Fed. Reg. 66621. The Grant Officer involved in the 1995 competition for funding under section 402 of the JTPA was James DeLuca (TR 54). Three entities, TOPS, the Alabama Department of Economic and Community Affairs (Alabama agency), and the Community Action & Community Development Agency of North Alabama applied for the grant to provide services in the state of Alabama (TR 56-58). Both TOPS and the State of Alabama were found to be responsible in connection with the section 402 competition (TR 55).

A panel of three people who were knowledgeable in migrant and seasonal farmworker programs was formed (TR 56). The panel's efforts were coordinated by Irene Pindle, a staff person in Mr. DeLuca's office (id.). Ms. Pindle ensured that all the procedures were followed and that all of the information presented to the panel was, to the best of her knowledge, accurate and

true (id.). Typically, each panel member individually rates each applicant in conformance with the SGA and then a summary meeting is held where the panel members iron out issues or questions they individually have about the scoring and the panel prepares a composite score for the Grant Officer to use (TR 56-58). The composite score is an average of the individual scores (id.). The panel report in the instant competition can be found at RX 1, p. 37-41. The report includes a two page cover memorandum which contains the composite scores of the applicants, the summary technical rating form which contains a table listing each panel members scores and the total and average scores for each criteria for the individual applicants and a summary of the strengths and weaknesses identified by the panel members for each applicant (id.). These documents were forwarded to Mr. DeLuca through Ms. Pindle (TR 59). Mr. DeLuca reviewed the report and went back through the applications and double checked some items in the individual proposals until he was satisfied that the panel and Ms. Pindle had performed their jobs (id.). He detected no inconsistencies in the ratings (id.). As part of the larger process in reviewing not only the Alabama applicants but all of the applicants reviewed by the panel, Mr. DeLuca determined that the panel had done a proper job of reviewing the proposals and making a recommendation, so he accepted their recommendation (TR 60). With regard to the competition for Alabama, the top scores were as follows: under criterion one, the Alabama agency, under criterion two, the Alabama agency, under criterion three, TOPS and under criterion four, the Alabama agency (id.). Therefore, Mr. DeLuca, acting on the recommendation of the panel, decided to select the Alabama agency as the potential grantee in Alabama (id.). A letter to that effect was sent to the Alabama agency (RX 1, p. B-1). In addition, a letter was sent to Tom Barnes at TOPS informing him that they did not win the bid (RX 1, p. B-2). Mr. DeLuca believes that these undated letters went out in late May based on the dates on the copies of the return receipts (TR 60-61).

Shortly after Mr. DeLuca sent out the letters, TOPS raised a question regarding the state clearinghouse process under Executive Order 12372 and whether the Alabama agency complied with the requirements under Executive Order 12372 (TR 63-64). Contact was originally made by phone and followed up in writing (TR 64). Mr. DeLuca testified that he asked Irene Pindle to find out whether the state of Alabama had a clearinghouse process and if so, why the Alabama agency had not complied with it (TR 65). Mr. DeLuca stated that Ms. Pindle was informed verbally and then in writing in the form of a letter from Robert Lunsford, Director of Alabama Department of Economic and Community Affairs, that the State did not have a clearinghouse; that it had been discontinued in 1992 (TR 65-66). In response to its inquiry, TOPS was sent a letter dated June 16, 1995 from Mr. DeLuca debriefing it on why it had not been selected as the grantee for Alabama and informing it that Alabama did not have a clearinghouse process (CX 6). On June 15, 1995, a request for administrative review in accordance with 20 C.F.R. § 636.10 was filed by TOPS with this Office. Complainant contends that the grantee, the Alabama Department of Economic and Community Affairs, failed to file their pre-application with the Alabama State Clearinghouse as required by Executive Order 12372 and that the score received by the grantee under the experience criteria was inflated compared to the score received by TOPS. Accordingly, TOPS has requested that it be named as the grantee as provided for under 20 C.F.R. § 633.205(e).

B. Standard of Review

TOPS contends that the appropriate standard of review is that contained in the Administrative Procedure Act at 5 U.S.C. § 706(2)(A). This section states in pertinent part

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(2) hold unlawful and set aside agency action, findings and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

5 U.S.C. § 706(2)(A). This part of the Administrative Procedure Act governs judicial review of final agency action by courts. 5 U.S.C. §§ 703, 704. This Office is not a court under Article III and there has not been final agency action. *See* 20 C.F.R. §§ 636.1, 636.11.

The regulations applicable to this matter specifically provide that “any applicant whose grant application is denied . . . may request an administrative review as provided in part 636, with respect to *whether there is a basis in the record to support the Department’s decision.*” 20 C.F.R. § 633.205(e) (emphasis added). The Secretary of Labor confirmed that this is the proper standard of review in the case of *North Dakota Rural Development Corporation v. U.S. Department of Labor*, 85-JTP-4 (Mar. 25, 1986). In fact, the Secretary found that this standard is a difficult one and properly so, since the Grant Officer must be given considerable discretion in determining the award of funds among multiple grant applicants. The Secretary stated that the “standard is similar to that used in government procurement cases and that the challenges to the Grant Officer’s determination ‘must demonstrate that [the] decision lacked any rational basis.’” *North Dakota Rural Development Corporation v. U.S. Department of Labor*, 85-JTP-4, p. 5 (Mar. 25, 1986).

C. Clearinghouse issue

TOPS contends that the Alabama agency should not have been awarded the grant because it did not comply with 20 C.F.R. § 633.202(d), the implementing regulation of Executive Order 12372 under Title IV, Section 402 of the JTPA. The Alabama agency stated on their application that there was no clearinghouse process in Alabama and therefore, it was not required to submit a preapplication. TOPS disputes this statement.

Mr. Raymond Clenney, the supervisor of the State Program Section of the Work Force

Development Division of the Alabama Department of Economic and Community Affairs, testified that the single point of contact clearinghouse had been within the Planning and Development Department of the Alabama Department of Economic and Community Affairs and that during a reorganization in the summer of 1992 the clearinghouse was discontinued as of September 30, 1992, and the employee designated as the single point of contact, Moncell Thornell, came to work for him (TR 114-115). An internal memorandum from the Director of the Alabama Department of Economic and Community Affairs dated July 24, 1992 details changes in the department in an effort to save funds (RX 3). One of the listed changes is “[t]he Clearinghouse[,] Demographics and Business Environment functions will be discontinued.” (RX 3). A second memorandum dated August 4, 1992 from Moncell Thornell “State Single Point of Contact” to “All State Clearinghouse Contacts” states

Due to continued proration of the State’s General Fund, the decision has been made to discontinue the operation of the Clearinghouse. Dissemination of applications for your review will be stopped with those received in this office no later than Friday, August 14, 1992. We will make an effort to coordinate issues raised up until Wednesday, September 30, 1992. After September 30, any further review or questions must be handled between the applicant, funding agency and you.

(RX 2). Mr. DeLuca stated that he relied on the State’s representation that the Clearinghouse had been disbanded and therefore, found that the Alabama agency had complied with Executive Order 12372 (TR 70).

According to the testimony of Ms. Lisa Digman, the employee of TOPS who prepared the grant application, TOPS’ pre-application was submitted to Janet M. Tate , Executive Director for the Central Alabama Regional Planning and Development Commission, in compliance with instructions received from Ms. Tate indicating that applications should be forwarded to her as the State Clearinghouse point of contact to be distributed for comment to the twelve regional planning commissions (TR 45). During the 1992 application process for program years 1993 and 1994, TOPS had sent the pre-application to all twelve regional planning commissions (TR 13-14). A letter was received by TOPS from Ms. Tate in response to their submission of the 1995 pre-application that stated “[a]s acting State Clearinghouse for projects having statewide impact, this agency has distributed [your] application for review among the twelve regional planning commissions. No objections were received.” (CX 2). In addition, TOPS received a letter from the Southeast Alabama Regional Planning and Development Commission indicating that it had reviewed the project application “in accordance with Presidential Executive Order No. 12372” and stated that it concurred with the project (id.).

First, the United States Department of Labor regulations implementing Executive Order No. 12372 specifically state

These regulations are intended to aid the internal management of the Department,

and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

29 C.F.R. § 17.1(c). Therefore, failure to comply with the regulations under Executive Order No. 12372 does not appear to be a legally valid challenge to the Grant Officer's decision to award the grant to the Alabama agency.

Second, even if TOPS could validly challenge the decision on this ground, the Grant Officer acted reasonably in accepting the state of Alabama's assurances that a clearinghouse did not exist in the state although there appears to be a great deal of confusion regarding whether a single point of contact clearinghouse existed in the state of Alabama. There was documentation submitted to the Grant Officer which supported Alabama's representation. On the other hand, there was documentation from Janet Tate, a state of Alabama employee, to TOPS which stated that she was the single point of contact. TOPS stated that for the prior application it had sent the preapplication to all twelve regional planning commissions for comment. However, no evidence was submitted to demonstrate that the state of Alabama had established the procedure followed by TOPS as its "consultation process expressly covering this program" under 20 C.F.R. § 633.202(d). It is not the Grant Officer's responsibility to sort out the internal inconsistencies of the Alabama state government when documentation has been submitted that establishes that the clearinghouse that had been set up to accept preapplications has been disbanded.

Finally, the application submitted by the Alabama agency contained numerous comments and references from state and local officials, including the Governor of Alabama. Therefore, the objective of Executive Order 12372 was accomplished in this instance. Accordingly, it is found that the Grant Officer's decision to accept the Alabama agency's application has a basis in the record to support it.

D. Experience review standard issue

The regulations at 20 C.F.R. § 633.203 list five review standards taken directly from the Act at section 402(c)(1), 29 U.S.C. § 1672(c)(2). One of the review standards to be used in choosing the grantee is "[a] previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers." 20 C.F.R. § 633.203(c). This review standard is contained in the SGA with a detailed description of the factors to be considered by the review panel and the Grant Officer. TOPS contends that the facts of record do not support the review panel's scoring of the Alabama agency under this experience review standard and do not support the Grant Officer's endorsement of the recommendation of the panel based upon the panel's flawed scoring.

The SGA lists four specific rating criteria, one of which is the review standard contained at 20 C.F.R. § 633.203(c) quoted above (RX 1, p. E-2). This criteria is rated by the review panel in a range of 0 to 30 points. The rating of this criteria is based on program experience and the capability to meet or exceed planned goals (id.). This criteria is rated

based on a previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers; documentation that the planned performance goals were either met or exceeded during the period of performance; and satisfactory description of the employment and training components and procedures necessary to undertake the goals of this grant solicitations (sic).

(RX 1, P. E-2). Later in the SGA under the *Content and Format of Funding Application* heading, the SGA lists the following elements to be included in the application: (1) the types of programs operated in the proposed service area in the last two years; (2) the types of programs operated outside the service area in the last two years; (3) the nature of the training employability development, and supportive services activities which were provided; (4) the actual versus planned number of participants and their placement into unsubsidized employment for each program activity; (5) a detailed description of each major activity and component of the program proposed for funding under this grant solicitation to meet the identified needs; and (6) an analysis of the extent to which the proposed employment and training program is consistent with the labor market assessment (id.) The fifth element lists six factors to be taken into account (id.). The criteria, elements and factors contained in the SGA are to be used by the review panel to rate the applicants. In several places in the instructions to the panel members it is emphasized that the ratings should be based only on the criteria contained in the SGA (RX 1, p. D-1 - D-9). The instructions to the panel members also contains an evaluation checklist for different types of criteria including “past experience” (RX 1, p. D-16).

TOPS disputes the Alabama agency’s rating under experience based on the fact that the agency did not include experience with migrant and seasonal farmworkers, only experience that it has obtained under Title II and Title III programs (Prehearing Brief of Complainant, p.10). TOPS maintains that the criteria requires the review panel and Grant Officer to take into account only experience in providing services to migrant and seasonal farmworkers under Title IV (Prehearing Brief of Complainant, pp. 8-12). In addition, TOPS points to the fact that the Alabama agency did have some experience under Title IV which it did not report on its application (Prehearing Brief of Complainant, p. 10). It administered the program for ten months from August 1992 through June of 1993 (CX 3). Apparently the placement rate for the Alabama agency during that time period was zero (id.).

In response to TOPS’ contentions, DOL states that the Department has interpreted the experience criteria to take into account not only experience with migrant and seasonal farmworker programs but also other employment and training programs. This interpretation of the Act and regulations has been in place since the beginning of the migrant and seasonal farmworker program under CETA and has endured under the amendments to CETA in 1978 and under the program under the JTPA (Grant Officer’s Prehearing Brief, pp. 7-12). DOL contends that its interpretation is consistent with the JTPA and the standard competitive government procurement policies, which the JTPA requires be used in selection of grantees, because it fosters full and open competition by increasing the number of potential applicants to operate programs under section

402 (Grant Officer's Prehearing Brief, pp. 12-13). In addition, DOL contends that if the Department applied the restrictive interpretation proffered by TOPS, only section 402 incumbents would be able to demonstrate the necessary experience. DOL states that lack of adequate competition in section 402 programs has been a serious concern for the Department (Grant Officer's Prehearing Brief, p. 14, TR 79-81). As an illustration, in the competition for program years 1995 and 1996, there was no competition in 38 states and only three states had more than two competitors (Grant Officer's Prehearing Brief, p. 14, TR 79-81).

The panel's scoring of the Alabama agency under the program experience criteria is supported by DOL's historical interpretation of the section dealing with program experience under the migrant and seasonal farmworker section of the JTPA and the CETA (*See* Grant Officer's Prehearing Brief, pp. 7-12). Applicants for this program are alerted to this interpretation in the SGA. The SGA under the *Section III - Program Experience* section states that this section of the application "should describe the applicant's capability and experience in administering employment and training programs." (RX 1, p. E-3). The elements listed under this general statement request that the applicant provide information on programs operated in and outside the service area (*id.*). These elements do not specify that an applicant should only provide information on migrant and seasonal farmworker programs. If DOL intended to consider experience in the migrant and seasonal farmworker area exclusively, it would have requested only information regarding experience in that area. Accordingly, it was not inappropriate for the panel to consider the Alabama agency's performance of other employment and training programs and in doing so, the panel did not go outside of the SGA. In addition, the program experience criteria considers not only past experience but also the details of the proposed program (RX 1, pp. E-2 and E-3). Mr. DeLuca testified that the panel usually determines how they are going to make the actual assignment of points between the elements described in the SGA and that function is left entirely up to the panel (TR 78-79).

We do not know which elements were given emphasis by this panel and that is not the issue before me. I need only determine that there is evidence of record that could provide a basis to support the Department's decision. The Alabama agency's application lists a number of programs under Title II and Title III of the JTPA that it had administered from July 1, 1991 through June 30, 1994 (RX 1, p. C-103). In each of these programs, the Alabama agency reported that it exceeded all performance standards (RX 1, p. C-105 - C-107). The panel, in its comments, details its findings of the strengths and weaknesses of the two applicants (RX 1, pp. D-39 - D-42). A review of these comments as well as the scores from the individual panel members demonstrates that the panel felt that the Alabama agency's application and program proposal was superior to that submitted by TOPS. It is noteworthy that the panel did score TOPS higher on the program experience which most probably reflects the fact that it was the incumbent and had experience in the area of migrant and seasonal farmworker programs. However, the Alabama agency received the higher score under the other three criteria and garnered the highest total score upon which the Grant Officer based his decision to choose it as the grantee.

With regard to TOPS' contention that the Alabama agency failed to provide information regarding its administration of the migrant and seasonal farmworker program from August of 1992 until June of 1993, the record shows that the state department was the same but the agency within the department that administered this earlier program was different. The agency that was awarded the grant for the 1995 and 1996 program years was the Alabama Service Delivery Area Division of the Alabama Department of Economic and Community Affairs (RX 1, pp. C-72 - C-132). The agency that took over the migrant and seasonal farmworker program in 1992 was the Job Training Division of the Alabama Department of Economic and Community Affairs (TR 109; CX 3). They are separate entities, therefore the Alabama Service Delivery Area was not remiss in not reporting the results of the 1992 program year administration by the Job Training Division. Even if one was to take into account the administration of the 1992 program by the Job Training Division, the circumstances surrounding the granting of that program to the state department would be factored into the determination as to whether the 1995-1996 grant should be given to the Alabama agency. According to both Mr. DeLuca and Mr. Clenney, who was employed in the Job Training Division at the time, the operator who had been awarded the grant for program years 1991 and 1992 ran into some difficulties and the director left town suddenly, so DOL had to find a replacement quickly (TR 103, 110). DOL asked the state agency if they would take over the program (TR 103). The agency accepted and was notified of their approval on August 15, 1992 (TR 103, 110). The program had been left in a shambles and the state agency only administered the program including start up from August 15th of 1992 until June 30 of 1993 (TR 111-112). Therefore, it is not surprising that the state agency did not fare well under these circumstances.

Mr. DeLuca testified that he was aware that the state of Alabama had administered the program from August 1992 through June of 1993 and that its record was not very good (TR 84-85). However, he was also aware of the circumstances surrounding the State's administration of the section 402 program and because of the short time the state had the program, it was not a major consideration when reviewing the panel's results (TR 102-103). When one takes into account that it was a different agency of the department that administered the earlier program and the circumstances surrounding that grant, Mr. DeLuca was justified in not counting it as a major consideration. Accordingly, with regard to both issues raised by TOPS under the Program Experience criteria, there is evidence in the record that provides a basis for the Grant Officer's decision to award the grant to the Alabama agency over TOPS.

ORDER

In accordance with the discussion above, the Tennessee Opportunity Programs request that it be designated as the funding grantee in the future under 20 C.F.R. § 633.205(e) is **HEREBY DENIED.**

JOHN M. VITTON
Chief Administrative Law Judge